Niaga Tani Sdn Bhd v Samarez Holdings Berhad

HIGH COURT (IPOH) — CIVIL SUIT NO 22–88 OF 2000
BALIA YUSOF J
19 MAY 2004

Civil Procedure — Summary judgment — Triable issues — Whether raised — Dispute as to amount owed for supply of goods — Whether exchange of affidavits confirmed existence of debt — Rules of the High Court 1980 O 14

This was an appeal by the appellant ('defendant') against the decision of the senior assistant registrar allowing the respondent's ('plaintiff') application for summary judgment under O 14 of the Rules of the High Court 1980. The plaintiff claimed for the sum of RM369,040.39 due and owing from the defendant being the cost of goods supplied to the defendant pursuant to a contract valued at RM742,992.51. The plaintiff claimed the defendant failed to settle the balance sum of RM369,040.39 as at 31 January 2000, which is the amount claimed in the writ of summons. The plaintiff further contended that the defendant had acknowledged by a letter dated 1 December 1999 that as at that date the amount owed to plaintiff was RM360,423.86 and there was documentary evidence denoting an undertaking by the defendant to pay RM20,000 monthly until their cash flow position improved, which the plaintiff submitted was an admission of the claim by the defendant. The affidavits filed by the defendant and plaintiff had indicated the same.

Held, dismissing the appeal:

(1) An O 14 application is a rehearing and the court in hearing the appeal has to consider the affidavit evidence filed in support and in reply of the application to determine whether or not there is a triable issue. After perusing affidavits of both parties, the defendant in this matter has not raised any bona fide triable issues. The issue of whether or not there is an agreement between the parties regarding the recovery of the amount acknowledged to be owing to the plaintiff was not a triable issue. The exchange of affidavits by the parties confirmed the indebtedness by the defendant (see paras 3, 4 and 6).

[**Bahasa Malaysia summary**

Ini adalah rayuan perayu ('defendan') terhadap keputusan penolong kanan pendaftar membenarkan permohonan responden ('plaintif') untuk perintah penghakiman terus di bawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980. Plaintif telah menuntut untuk jumlah RM369,040.39 yang perlu dibayar dan berhutang daripada defendan, yang merupakan kos barang yang dihantar kepada defendan di bawah suatu kontrak bernilai RM742,992.51. Plaintif telah menuntut

bahawa defendan telah memaklumkan melalui surat bertarikh 1 Disember 1999 bahawa pada tarikh berkenaan, jumlah yang terhutang kepada plaintif adalah RM360,423.86 dan terdapat keterangan dokumentar yang menunjukkan satu aku janji yang dibuat oleh defendan untuk membayar RM20,000 sebulan sehingga kedudukan aliran tunai mereka pulih, yang telah dimajukan oleh plaintif sebagai suatu pengakuan tuntutan oleh defendan. Kesemua afidavit yang difailkan oleh defendan dan plaintif telah menunjukkan yang sama.

Diputuskan, menolak rayuan tersebut:

(1) Permohonan di bawah A 14 adalah suatu perbicaraan semula dan mahkamah dalam membicarakan rayuan berkenaan harus menimbang keterangan afidavit yang difailkan sebagai sokongan dan jawapan kepada permohonan dalam memutuskan sama ada terdapat isu-isu yang perlu dibicarakan. Isu sama ada terdapat suatu persetujuan di antara pihak-pihak berkenaan untuk mendapat kembali jumlah hutang kepada plaintif yang dimaklumkan bukanlah suatu isu yang perlu dibicarakan. Penukaran afidavit oleh pihak-pihak mengesahkan keberhutangan defendan (lihat perenggan 3, 4 dan 6).]

Notes

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173

For cases on summary judgment, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6-048]–[10.6-063]

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332 (refd)
Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Marina Sports Ltd v Alliance Richfield Pte Ltd [1990] 3 MLJ 5; [1990] SLR 445 (refd)
Memphis Rogues Ltd v Skalbania [1982] 38 BCLR 193 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Syn Lee & Co Ltd v Bank of China [1961] MLJ 87 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

Chun Chee Chong (CC Chun & Co) for the plaintiff
Mohd Iskandar (Lee Noush with him) (Gideon Tan Razali Zaini) for the defendant

Balia Yusof J:

The defendant (appellant) filed an appeal against the decision of the learned senior assistant registrar allowing the plaintiffs (respondent) application for summary judgment under O 14 of the Rules of the High Court 1980. In the application before the learned senior assistant registrar the plaintiff claimed for the sum of RM369,040.39 due and owing from the defendant being the cost of goods supplied to the defendant arising out of a contract dated 26 January 1999. Under the said contract, the plaintiff undertook to supply manures to the defendant for the period between 28 January 1999 and 30 December 1999. The total value of the contract was RM742,992.51. The plaintiff claimed that as at 31 January 2000 the defendant has failed to settle the balance sum of RM369,040.39 which is the amount claimed in the writ of summons filed against the defendant. It is further contended by the plaintiff that by a letter dated 1 December 1999, the defendant has acknowledged that as of that date the amount owed to the plaintiff is RM360,423.86 as exhibited in exh "VCK 3" of the plaintiff's affidavit in support of the O 14 application. It was further contended by the plaintiff that the said letter also contain an undertaking by the defendant to pay RM20,000,00 monthly until they improve their cashflow position. The plaintiff submits that there is an admission of the claim by the defendant and that they have not raised any defence to the claim and have also failed to raise any triable issue in the application for summary judgment.

The defendant took the stand that there are triable issues to be determined and as such summary judgment is inappropriate. Three affidavits has been filed by the defendant and five affidavits by the plaintiff. A perusal of the affidavits filed by the parties indicates that the defendant has admitted that as at 1 December 1999 it was indebted to the plaintiff in the sum of RM360,423.86 and that a proposal was made to settle the said debt by a RM20,000 monthly instalment until its cashflow position improves. The defendant also never denies the amount claimed by the plaintiff as stated in the writ of summons filed against them.

It is trite that an appeal against an O 14 application is a rehearing (*Koh Siak Poo v Perkayuan OKS Sdn Bhd* [1989] 3 MLJ 164) and this court in so hearing the appeal has to consider the affidavit evidence filed in support of the application and the affidavits in reply in order to determine whether or not there is a triable issue in the matter. The Court of Appeal has also reminded in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 289:

> It is important to bear in mind that O14 is a summary judgment procedure and not a summary trial procedure

As I have stated earlier, no less than eight affidavits has been filed between the parties in the application, however after perusing them I am of the view that the defendant has not raised any bona fide triable issue. In *Syn Lee & Co Ltd v Bank of China* [1961] MLJ 87, Thomson CJ explained:

> With great respect it seems to me there may have been some slight misapprehension on the part of the assistant registrar and on the part of the trial judge as to the proper approach. It is not quite the same as the problem with which we are always being faced in the chancery side of the court of trying issues on affidavit evidence. In a case of the sort it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed. On the other hand we have to remember that the order is there as much in the interests of the defendants as in the interests of plaintiffs. It is in the interest of plaintiffs, that they should be able to get prompt judgment when there is no real defence. But on the other hand, it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.

My perusal of the affidavits exchanged between the parties indicate that the issue whether or not there is an agreement between them regarding the recovery of the amount acknowledged to be owing to the plaintiff is not a triable issue. Similarly the competency of one Mr Khaw Beng Siong who represented the plaintiff to settle the issue between the two parties is not a triable issue and has been well established and countered by the affidavit evidence. It has not been disclosed that the defendant has put up a defence which can satisfy the court that there is an issue to be tried. Yong Peng How J in *Marina Sports Ltd v Alliance Richfield Pte Ltd* [1990] 3 MLJ 5 at p 6 reiterated:

> This being an O 14 application, it is not for the court to decide on the final merit of this issue, but only to provide an opportunity for the defendants to put up a defence if the court is satisfied that there is an issue which should be tried.

Couched differently, the principle has also been summarized and described in various other ways as suggested from the following passage in *Memphis Rogues Ltd v Skalbania* [1982] 38 BCLR 193:

> The question has been stated in a number of ways; is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry, is there a *bona fide* triable issue?

In deciding whether or not there is a triable issue, I am further guided by the decision of the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, where at p 408 Mohamed Azmi SCJ, delivering the majority judgment of the court said:

> In our view, basic to the application of all these legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the

defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

On the treatment of conflicting affidavit evidence, I am reminded of the approach stated by Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 and the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* (*supra*) in applying the said approach in an O 14 application, said at p 408:

> Under O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they a triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Bearing in mind the approach as suggested above, it is my considered view that the exchange of affidavits by the parties in this case does little to detract from the undisputed fact of indebtedness by the defendant. The assertions and denial by the defendant being inconsistent with the undisputed contemporary documents in exhs "VCK 1" and "VCK 3" of encl 6 renders the issues put forth as not triable. Approaching the matter in a slightly different perspective, Gunn Chit Tuan SCJ in a dissenting judgment in *Bank Negara Malaysia v Mohd Ismail & Ors* (*supra*) stated at p 414:

> The scope of O 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence; or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd; Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd*). It was held in the well-known House of Lords' case of *Jacobs v Booth's Distillery Co* that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v Cash*).

In my judgment, from the affidavit evidence adduced, the defendant has failed to show the abovementioned. In the circumstances, the appeal against the decision of the learned registrar allowing the O 14 application is hereby dismissed with costs. In view of the fact that the defendant has paid RM20,000

as averred in encl 8 and admitted by the plaintiff in encl 10, the judgment sum shall accordingly be reduced by the same amount.

Appeal dismissed.

Reported by Ushah Kanapathipillai